

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 42502-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

Sue Anne Gorman, Plaintiff/Appellee

v.

Pierce County, Defendant/Appellant

Brief of Appellant Pierce County

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I. INTRODUCTION

The plaintiff was attacked inside her home by Betty and Tank, two dogs that gained entry into her home through a partially-opened sliding glass door. The plaintiff sued the owners of Betty and Tank, and each admitted fault under RCW 16.08.040, which imposes strict liability on dog owners for the bites inflicted by their pets. See RCW 16.08.040.

At issue in this appeal is whether, in addition to the dog owners, Pierce County can also be held liable for the injuries Betty and Tank inflicted on the plaintiff, or whether the plaintiff's negligence suit against the County is barred by the public duty doctrine.

The trial court ruled that the "failure to enforce" exception to the public duty doctrine applied in this case. This exception only applies, however, if a statute or ordinance places on a governmental employee a mandatory duty to perform a specific action to correct a violation, and it does not apply if performance of the action is discretionary. In this case, the language contained in Former Pierce County Code 6.07.010 conferred discretion on the County's animal control to declare a dog as "potentially dangerous" once probable cause existed to do so. The ordinance did not impose a mandatory duty to take this action. The trial court's ruling that the "failure to enforce" exception applies should be reversed, and this case

should be remanded and dismissed with respect to Pierce County.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to dismiss Pierce County as a party to this lawsuit pursuant to the County's CR 50 motion for judgment as a matter of law because the public duty doctrine precluded the plaintiff's negligence claim against the County.
2. The trial court erred in ruling that the "failure to enforce" exception to the public duty doctrine applied in this case.
3. The trial court erred in instructing the jury that Pierce County had a duty to "protect the public from a potentially dangerous dog" when such language is a misstatement of applicable law that unduly expanded the County's duty of care.
4. The trial court erred in instructing the jury that Pierce County had a duty to "classify", "control", "confiscate and confine" a potentially dangerous dog under Former Pierce County Code 6.07.010.
5. The trial court erred in instructing the jury that Pierce County could be found liable in negligence without a finding that a breach of duty by the County was the proximate cause of plaintiff's injuries.
6. The trial court erred in admitting unfairly prejudicial

evidence concerning Defendant Wilson's ownership of dogs that extended six years prior to her ownership of "Betty," the dog at issue in this case.

7. The trial court erred in entering the jury's damages award against the County when the jury's verdict was the result of prejudicial error.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in failing to dismiss Pierce County as a party to this lawsuit pursuant to the County's CR 50 motion for judgment as a matter of law when the public duty doctrine precluded plaintiff's claim against the County?

2. Did the trial court err in ruling that the "failure to enforce" exception to the public duty doctrine applied based on Former PCC 6.07.010 when that ordinance does not contain the requisite "mandatory duty" necessary to trigger the exception, but instead grants Pierce County's animal control the *discretion* to declare a dog as "potentially dangerous" if an officer has probable cause to believe the dog falls within that category?

3. Did the trial court err in instructing the jury that Pierce County had the duty to "protect the public from a potentially dangerous dog" when such language contravenes the public duty

doctrine and allowed Pierce County to be found liable in negligence for breaching a duty of care that was not owed to the plaintiff herself?

4. Did the trial court err in instructing the jury that Pierce County had a duty to “control”, “confiscate and confine” a potentially dangerous dog under Former Pierce County Code 6.07.010, when these alleged duties are not applicable under the facts of this case?

5. Did the trial court err in instructing the jury that Pierce County could be found liable in negligence without a finding that a breach of duty by the County was the proximate cause of plaintiff’s injuries?

6. Did the trial court err in entering the jury’s damages award against the County when the jury’s verdict was the result of prejudicial error arising from jury instruction error?

IV. STATEMENT OF THE CASE

A. Facts

Defendant Shellie Wilson resided in Gig Harbor with her son, Defendant Zachary Martin. RP 1177. Wilson was estranged from Martin’s father. In December 2005, when Martin was 16 years old, his father committed suicide in Alaska. RP 1080-1; RP 1230. Martin went to

Alaska and was in charge of having his father's remains cremated. RP 1230. Martin had difficulty coping with his father's death. RP 1081. Martin had friends who were pit bull breeders. RP 1230. Aware of the situation, his friends gave Martin a pit bull puppy. RP 1081; 1197. The puppy was named "Betty." RP 1080-81.

Plaintiff Sue Gorman lived in a cul de sac with her service dog Misty one house away from Wilson and Martin. RP 404-05. The Russells lived on one side of Gorman, and the Kings lived on the other. RP 405. Wilson and Martin lived directly next to the Kings. RP 405. All of these neighbors were dog owners.

The neighborhood had a culture of letting dogs run unleashed. RP 498, 1200, 1126. Betty would go to the Kings' residence to receive treats, and their dog reciprocated by visiting Wilson. RP 1202. Russell had a dog named Romeo that on occasion would bark at Wilson's gate. RP 1200-01.

In addition, Romeo usually came to Gorman's house after 5 a.m. when Russell left for work. RP 409. Romeo would enter Gorman's house through a sliding glass door that Gorman left open "most of the time." RP 409. The open door allowed Misty to go out when needed, and it allowed Romeo to come in when he wanted. RP 410. This particular arrangement went on "for years." RP 410. Romeo had been a companion of Misty's

from the time she was a puppy. RP 411.

Wilson considered Betty as belonging to Martin, but Wilson shared in providing for Betty's needs. RP 1178-79. Martin was on his high school's wrestling team, and he took Betty with him to practice. RP 1084. He also took Betty when he visited friends. RP 1084. Betty always slept at night on Martin's bed. RP 1060.

At some point, Martin's best friend Kenny Markam asked for permission to live at Martin's house in order to finish high school. RP 1206. Markham's own living situation was not good. RP 1206. Wilson gave him permission to live with them. Markam had a pit bull named Lola, which he initially brought with him to Wilson's house. RP 1206.

On August 31, 2006, King called 911 to report that two pit bulls were at his back door acting aggressively, but he did not request follow-up contact. RP 715. These dogs were Betty and Lola. Despite King's request for no follow-up contact, an animal control officer responded to the King residence; by that time, the dogs had left King's property. RP 723. In investigating the matter, the officer made contact with Shellie Wilson. RP 718. Wilson admitted to the officer that her dogs frequently got loose and ran at large. RP 719. She also admitted that they did not have current licenses for either dog. RP 719. The officer did not have evidence that the dogs had bitten anyone. RP 745-46. Nor did the officer

witness any conduct by the dogs. RP 746. The officer issued Wilson an infraction for violating an ordinance requiring owners to keep their dogs from running loose, and he also cited her for not having a current dog license. RP 735.

As a result, Markam was told that he had to remove Lola from Wilson's residence or else he would not be allowed to stay there himself. RP 1206. Markam removed Lola from Wilson's residence that day. RP 1207.

Also in 2006, Betty went into heat for the first time. RP 1086. She was detained in Wilson's backyard on a zip line and chain runner because detaining her inside posed problems. RP 1073, 1085. Martin was not aware other dogs could gain entry into his backyard. RP 1085-86. They had no plans to breed Betty. RP 1235. Wilson's back yard was fully enclosed with fencing. RP 1186. However, the fencing had patchwork done, and a gate did not appear secure. RP 624. Betty became pregnant. RP 1086. She gave birth to 12 puppies. RP 900, 1087, 1094; 1235. It appeared from the puppies' markings that the father was a brown Labrador from the neighborhood. RP 1235. One of the puppies ate more and became "heftier" than the others, and this puppy was eventually named "Tank." RP 1089.

Martin knew Defendant Evans-Hubbard's daughter, Rachel,

through their high school wrestling program. RP 1085. They lived about a half-mile away from Martin. RP 1126. In early-February 2007, after Rachel's Great Dane had died, Martin gave Tank to Rachel. RP 900; 1108; 1122. Tank was six months old. RP 1108. The other puppies were also found homes and given away.

At times, there was a great deal of foot traffic coming in and out of Wilson's house. RP 1212. Many members of Martin's wrestling team would visit, which resulted in kids coming in and going out, and this afforded Betty with opportunities to escape. RP 1212. During a three-week period from February 10th through March 1st, 2007, Betty was the subject of three complaints to the County. At the time, the County's Animal Control had four animal control officers on duty to cover an area of 1,700 square miles. RP 634; Exhibit 82 , (McCarthy Deposition, at 17).

On the evening of February 10, 2007, Gorman and Misty returned home from grocery shopping. RP 1263. Gorman parked her car in the driveway and let Misty out. RP 1263. Gorman got out and saw Betty running toward them. RP 1263. Gorman ran into her house with Misty ahead of her. RP 1263. Gorman tried to retrieve her groceries about 15 minutes later, but Betty was still in or near Gorman's front yard. RP 1264. Betty growled and snarled at Gorman. RP 1265. Gorman called 911. RP 1265. A deputy sheriff responded to the call, but by that time Betty was

gone. RP 1266. The deputy sheriff asked Gorman to relate what happened, went to Wilson's house, found no one was home, and left a note at Wilson's house. RP 1266-67. The deputy sheriff returned to Gorman's house, explained his attempt to contact Wilson, and told Gorman that she might want to call Animal Control on Monday morning. RP 1324. Gorman placed a call to Animal Control, heard a recorded message, and then left her name and number. RP 1269. But there was no record Gorman's call was received by Animal Control. RP 1002. Gorman made no follow-up call. RP 1326-27.

On February 22, 2007, Rick Russell, Romeo's owner, reported two pit bulls running loose and chasing kids. The following day, an animal control officer attempted to make contact with Wilson. RP 653. The officer found no one home and posted a notice on the front door, to which neither Wilson nor Martin responded. RP 591, 653. The officer mailed forms to the Russell family to obtain their written statement, but the Russells delayed in responding. RP 653. The animal control officer did not witness any behavior by the dogs, had no indication a dog bite was involved, and lacked a written statement from a complainant.¹ RP 654.

Animal control officers do not declare an animal potentially

¹ The Russells delayed over six months and did not submit a written statement until **after** the August 2007 attack on their neighbor. RP 654.

dangerous unless they have sufficient evidence to support the declaration in the hearings process. RP 787. Dog owners have a right to contest a potentially dangerous dog declaration at a hearing, and the owner may appeal the hearing examiner's decision to superior court. See Former PCC 6.07.010.

If an officer witnessed the bite or aggressive behavior, he or she could testify regarding the dog's behavior at the potentially dangerous dog hearing. RP 787. However, the citizen complainant is normally the only eye witness to the dog's behavior. See RP 787. At the administrative hearing, a potentially dangerous dog declaration would likely be overturned if there is no eye witness to support the declaration. RP 785. Officers have a range of possible actions in addition to or in lieu of declaring a dog as potentially dangerous; such actions include issuing a verbal warning or issuing a notice of infraction. See RP 731.

On March 1, 2007, Betty chased Misty into Gorman's house. RP 1270. Betty began jumping at the glass door. RP 1270. Gorman closed the door's curtain and called 911. RP 1270. A deputy sheriff responded to the scene after Betty had left. The deputy sheriff talked to Gorman, went to Wilson's residence, stayed for a half- hour, and returned to Gorman's house with Martin. RP 1271. Martin apologized and told Gorman he would "fix the fence tomorrow." RP 1272. Martin and

Gorman exchanged phone numbers. RP 1271.

Betty had subsequent instances of aggressive conduct, including a July 2007 incident in which Betty entered Gorman's house through Gorman's sliding door. RP 1274. Gorman did not report any of these subsequent incidents to Animal Control or otherwise call 911. RP 1322. Nor did Gorman keep her sliding door closed. Gorman did make phone calls to Martin directly. RP 1273. But Martin failed to return Gorman's calls. RP 1273.

In 2007, Evans-Hubbard's daughter obtained a wrestling scholarship to a college in Kentucky and was starting her freshman year in the fall. RP 1213. Evans-Hubbard asked Wilson to take care of Tank for two weeks in August so she could drive Rachel to Kentucky and help move her into her dorm. RP 1121, 1214.

During the six months that Evans-Hubbard had Tank, she had never seen or heard of Tank snapping, growling, or biting anyone. RP 1124. Tank interacted well with friends, relatives and neighbors. RP 214. Tank would sleep with Evans-Hubbard's 95-year-old grandmother. RP 1124.

On August 17, 2007, Evans-Hubbard left with her daughter for Kentucky. RP 1121. Wilson and Evans-Hubbard had discussed how Tank would be contained. RP 1214. Evans-Hubbard brought Wilson a

two-foot screw-into-the-ground stake and stainless steel chain with a full body harness for Tank's detention outside when he was not directly supervised by Wilson or Martin. RP 1214.

On the morning of August 21, 2007, Betty and Tank were playing together inside Wilson's house. RP 1061 (Martin). Martin's girlfriend, Makayla Baker, was also in the house. RP 1061. At about 7:30 a.m., Wilson heard Makayla open a sliding door to let Betty and Tank outside. RP 1220.

At 8:22 a.m., Gorman was in bed and heard the sounds of growling, snarling, and barking. RP 407. Betty and Tank had entered her house and were in her bedroom. RP 407. Misty immediately got off the bed and ran safely outside. RP 407. Romeo was on the bed under the covers. RP 408. Betty and Tank jumped on Gorman's bed, and Betty bit Gorman on her left arm. RP 410. When Romeo jumped off the bed, Betty and Tank both went after Romeo and viciously attacked him. RP 409-1. When Gorman tried to grab Romeo, Betty and Tank bit her hands. RP 411.

Gorman retrieved a gun from underneath her nightstand and pointed it at the dogs. RP 413. She pulled the trigger several times, but the gun never fired. RP 413. She ended up throwing the gun at the dogs in frustration. RP 413. She then grabbed a walking stick and tried to hit

the dogs over the head, but the dogs paid no attention. RP 414. Gorman eventually picked up Romeo, put him in a closet, and pushed the closet door closed. RP 414. By that time, Romeo was covered in blood and nearly dead. RP 414. Betty then attacked Gorman by jumping at her and biting at her face and breasts. RP 414. Meanwhile, Tank managed to reopen the closet door and resumed attacking Romeo. RP 415-16. Betty joined Tank in attacking Romeo. RP 416. Gorman grabbed her telephone, left the house, and shut the sliding glass door behind her to trap Betty and Tank inside. RP 416. She called 911. RP 416.

Gorman suffered injuries that required hospitalization and a lengthy and painful recovery period. Romeo did not survive the attack. RP 623.

Betty and Tank were extracted from Gorman's house and detained. Tank was euthanized a month later. RP 1122. Betty remained detained at the Humane Society pending the outcome of criminal charges that were filed against Wilson and Martin arising out of the attack. RP 1073-74. Wilson and Martin entered guilty pleas. RP 1226. At sentencing, the court ordered Wilson and Martin to pay \$23,000 in restitution to Gorman, serve 30 days on an ankle monitor, and serve four years of probation that included no dog ownership. RP 1226, 1230. Betty was euthanized shortly after Wilson and Martin were sentenced. RP 1073-74.

B. Procedural Facts.

In July 2010, Gorman filed a lawsuit in Pierce County Superior Court naming as defendants Wilson, Martin, Evans-Hubbard, and Pierce County. On February 10, 2011, Pierce County moved for summary judgment arguing that the public duty doctrine precluded Gorman's negligence action against the County. The Honorable Stephanie Arend denied the motion, ruling that the failure to enforce exception to the public duty doctrine applied. The County sought discretionary review of this ruling. On June 22, 2011, the Honorable Eric B. Schmidt entered a ruling denying review. *See* Case No. 42022-8-II.

At trial, over the County's objections, the trial court allowed plaintiff to introduce evidence that from 2000 to 2006, 10 complaints to Animal Control were made concerning Wilson's dogs even though none of the calls were made by plaintiff and none concerned Betty. Plaintiff made repeated references to this evidence throughout the trial. RP 688; Illustrative Exhibit 78; 726-7; 779, 924, 967, 971, 977, 1114.

The County took exception to the Court's Instruction Number 5 in which the court instructed the jury that Pierce County could be found liable for ". . . [f]ailing to protect the public from a potentially dangerous dog." RP 1356, CP 881. The County's attorney argued that this was not an accurate statement of the County's duty under the public duty doctrine.

RP 1356. The County also took exception to the other definitions of the County's duty: "Failing to confiscate and confine a potentially dangerous dog is also misleading, as if that's a required thing in all cases." RP 1356.

At the close of the plaintiff's case, the County raised a motion for judgment as a matter of law under CR 50. RP 1448. The County argued that the failure to enforce exception to the public duty doctrine did not apply because the ordinance at issue, Former Pierce County Code 6.07.010, gave the officers the discretion over whether to declare any individual dog as "potentially dangerous." RP 1450. The County argued: "These deputies were not required to classify any particular dog in a particular way." RP 1450. The court denied Pierce County's CR 50 motion as follows:

With regard to failure to enforce, I would rely also upon the *King vs. Hutson* case, and find that the failure to enforce exception applies in this case. They had a duty once they were aware of a violation to investigate and take action.

RP 1456. Plaintiff voluntarily withdrew her claim that the special relationship exception to the public duty doctrine applied, leaving only the failure to enforce exception for the jury's consideration. RP 1474-75

Defendants Wilson, Martin and Evans-Hubbard each admitted liability under the strict liability dog bite statute. See RP 1463. The jury found each of the defendants liable including Pierce County. CP 904.

The jury apportioned fault as follows: Wilson and Martin 52%, Pierce County 42%; Evans-Hubbard 5%, and Gorman 1%. CP 904.

V. ARGUMENT

A. The Trial Court Erred in Failing to Dismiss Pierce County as Party to This Lawsuit Under the Public Duty Doctrine.

1. The Failure to Enforce Exception to the Public Duty Doctrine Does Not Apply Because Former Pierce County Code (PCC) 6.07.010 Did Not Impose A Mandatory Duty to Declare Betty a Potentially Dangerous Dog.

a. The Public Duty Doctrine

A plaintiff who raises a claim of negligence has the burden of proving each of the following four elements: (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, (3) the breach was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered legally compensable damages. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 378, 972 P.2d 475 (1999). To be actionable in negligence, the duty at issue must be owed to the injured plaintiff, and not owed to the public in general. *Fishburn v. Pierce County Planning and Land Services*, 161 Wn. App. 452, 464, 250 P.3d 146 (2011) (citing *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988)).

This basic principle of negligence law is expressed in the public

duty doctrine. “Under the public duty doctrine, the government is liable for a public official’s negligence *only if the official breaches a duty owed to the injured person as an individual*, rather than the public in general.” *Taylor*, 111 Wn.2d at 163 (emphasis added). The public duty doctrine reflects the policy that “legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.” *Taylor*, 111 Wn.2d at 170. The public duty doctrine functions as a “focusing tool” used to determine whether the local government owed a specific duty to a particular individual, the breach of which is actionable, or merely a duty to the “nebulous public,” the breach of which is not actionable. *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) (quoting *Taylor*, 111 Wn.2d at 166).

The question of whether Pierce County owed an actionable duty to the plaintiff in view of the public duty doctrine presents a question of law that is reviewed *de novo*. See *Cummins v. Lewis County*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006). In addition, the trial court’s denial of the County’s CR 50(a) motion for judgment as a matter of law is also reviewed *de novo*. See *Weber Constr., Inc. v. County of Spokane*, 124 Wn. App. 29, 33, 98 P.3d 60, *rev. denied* 154 Wn.2d 1006 (2004).

b. The Failure to Enforce Exception to the Public Duty Doctrine.

There are four exceptions to the public duty doctrine: (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship. *Fishburn*, 161 Wn. App. at 464 (citing *Cummins*, 156 Wn.2d at 853 n.7. If one of these exceptions applies, the governmental entity owes an actionable duty to the plaintiff. *Cummins*, 156 Wn.2d at 853. When no exception is applicable, the plaintiff's negligence suit against the governmental entity is barred by the public duty doctrine. *See, e.g., Taylor*, 111 Wn.2d at 170.

The failure to enforce exception imposes a duty of care upon the governmental entity that is actionable in negligence if the plaintiff meets his or her burden of showing each of the following four elements: (1) government agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation; (2) they fail to take corrective action; (3) a statutory duty to take corrective action exists; and (4) the plaintiff is within the class the statute intended to protect. *Halleran v. Nu West, Inc.*, 123 Wn. App. 701, 98 P.3d 52 (2004). Under the third prong, a statutory duty to take corrective action is present only if a statute or ordinance gives "a *specific directive* to the governmental employee as to what should be done" in the particular instance. *Pierce v. Yakima*

County, 161 Wn. App. 791, 800, 251 P.3d 270 (2011)(emphasis added).

The exception is inapplicable when the statute does not provide a specific directive to the employee, but instead “merely vests discretion in the [employee] in th[e particular] situation.” *Pierce*, 161 Wn. App. at 801.

c. Former PCC 6.07.010 Does Not Impose a Mandatory Duty to Declare Betty a Potentially Dangerous Dog.

Former PCC 6.07.010 is entitled “Declaration of Dogs as Potentially Dangerous – Procedure.” As its title indicates, the ordinance establishes the procedures the County’s animal control authority is to follow in classifying potentially dangerous dogs. The ordinance reads, in pertinent part², as follows:

The County or the County’s designee **shall** classify potentially dangerous dogs. *The County or the County’s designee may find and declare an animal potentially dangerous if an animal care and control officer has probable cause to believe that the animal falls within the definitions set forth [of “potentially dangerous dog”].*³

² The full text of Former PCC 6.07.010 is provided at Appendix A.

³ A “potentially dangerous dog” is defined as:
any dog that when unprovoked: (a) Inflicts bites on a human or a domestic animal either on public or private property, or (b) chases or approaches a person upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack, or any dog with a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or otherwise to threaten the safety of humans or domestic animals.

RCW 16.08.070(1); see also PCC 6.02.010(X).

Under the failure to enforce exception, the issue here is **not** whether Betty **should** have been declared a potentially dangerous dog prior to the August 2007 attack on Gorman, but whether the ordinance imposed a mandatory duty requiring that this action be taken. See e.g. *Pierce*, 161 Wn. App. at 796. The ordinance contains no mandatory duty. While the first sentence provides: “The County or the County’s designee **shall** classify potentially dangerous dogs,” the procedure established by which dogs are to be classified specifically grants *discretion* to act whenever an animal control officer has probable cause to believe a particular dog fits within the definition: “The County or the County’s designee ***may find and declare an animal potentially dangerous if an animal care and control officer has probable cause to believe that the animal falls within the definition[] . . .***” Former PCC 6.07.010. As this language indicates, the designee’s discretion is triggered by probable cause, which exists in this context when facts and circumstances within the officer's knowledge “are sufficient to cause a person of reasonable caution to believe” that the dog is potentially dangerous. See *State v. Huff*, 64 Wn. App. 641, 646, 826 P.2d 698 (1992)(defining probable cause in the criminal law context).

The only permissible way to “classify” dogs under this ordinance

is by following the procedure established in the ordinance itself. The ordinance makes it clear that no dog may be declared potentially dangerous without probable cause, and the existence of probable cause with respect to any particular dog triggers not a mandatory duty to file a declaration, but instead the discretion to file the declaration.

The trial court concluded, however, that the “shall” in the ordinance’s first sentence imposed a mandatory duty on the designee to classify Betty as a potentially dangerous. In so doing, the court failed to give the word “may” in the second sentence its plain and ordinary meaning, which is to grant or confer discretion. The same rules in interpreting statutes apply in interpreting municipal ordinances. *City of Puyallup v. Pac. Nw. Bell Tel. Co.*, 98 Wn.2d 443, 448, 656 P.2d 1035 (1982). The court gives terms in a statute or ordinance their plain and ordinary meaning. *See State v. Hentz*, 99 Wn.2d 538, 541, 663 P.2d 476 (1983)(with regard to statutes). In construing statutes and ordinances, “ the words ‘will’ and ‘shall’ are mandatory, while words like ‘may’ are permissive and discretionary.” *State v. Stivason*, 134 Wn. App. 648, 656, 142 P.3d 189 (2006), *rev. denied*, 160 Wn.2d 1016, 161 P.3d 1027 (2007).

“Where a provision contains both the words ‘shall’ and ‘may,’ ***it is presumed that the lawmaker intended to distinguish between them, ‘shall’ being construed as mandatory and ‘may’ as permissive.***”

Scannell v. City of Seattle, 97 Wn.2d 701, 704, 648 P.2d 435 (1982) (emphasis added). The “shall” in the first sentence places the task of classifying dangerous dogs on the County or its designee. The second sentence establishes the *procedure by which this classification is to occur*, and the term “may” grants the discretion on whether to declare a particular dog as potentially dangerous. The trial court failed to give the plain and ordinary meaning to the word “may.”

The trial court also erred in finding the “shall” in the first sentence imposed a mandatory duty within the context of the rest of the ordinance. The court must read a statute or ordinance as a whole, giving effect to all language used, without rendering any portion meaningless or superfluous. *See Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). The ordinance’s title: “Declaration of Dogs as Potentially Dangerous – Procedure” indicates the intent behind the ordinance was to establish the procedure by which dogs are to be classified. Under this procedure, the ability to declare a dog as potentially dangerous dog is triggered **only** when there is probable cause to believe a certain dog is potentially dangerous. Therefore, the ordinance does not impose a “mandatory duty to classify” any and all dogs that may fall within the category of “potentially dangerous.” Instead, the ability to classify a dog is contingent on an officer’s having *probable cause* to

believe *any particular dog* is potentially dangerous; and when probable cause is present, the ordinance grants the *discretion* to file a declaration. The trial court erred in reading the “shall” in the first sentence as imposing a mandatory duty in isolation from the remainder of the ordinance.

The trial court construed the “shall” as placing a mandatory duty on the County “to investigate and take action” “once they were aware of a violation.” RP 1456. The trial court’s interpretation is not supported by the actual language contained in the ordinance. The key factor triggering the ability to file a declaration is whether an officer has probable cause to believe the dog is potentially dangerous, not whether an officer undertakes an investigation that eventually leads to this conclusion. In other words, probable cause triggers the discretion to declare a dog as potentially dangerous, and it does not matter under the ordinance whether the officer develops this probable cause after a hundred hours of investigation or **after no investigation whatsoever**. Once probable cause exists, with or without an investigation, discretion is triggered. The trial court erred in finding a mandatory duty to investigate under this ordinance.

In order for a statute or ordinance to contain a mandatory duty to take corrective action, the statute or ordinance must contain a specific directive to the government employee as to what should be done when faced with a specific situation. *See e.g., Pierce v. Yakima County*, 161

Wn. App. 791, 251 P.3d 270 (2011). *Pierce* illustrates that general statutory language is not sufficient to trigger application of the failure to enforce exception even when the word “shall” is present in the statute.

In *Pierce*, the plaintiff alleged that Yakima County building officials were negligent in inspecting and approving his newly installed residential propane tank and fuel line, which exploded after the plaintiff attempted to ignite it. The Court of Appeals held that the failure to enforce exception to the public duty doctrine did not apply, and it affirmed the dismissal of the plaintiff’s suit against Yakima County.

The plaintiff in *Pierce* asserted the following code provision imposed a mandatory duty on the county’s employee to correct a violation:

. . . [the building official] *shall* make or cause to be made any necessary inspections and *shall* either approve the portion of the construction as completed or *shall* notify the permit holder wherein the same fails to comply with this code.

Pierce, 161 Wn. App. at 799 (quoting International Residential Code section R109.1). The Court of Appeals rejected this argument despite the presence of the word “shall” throughout the provision. The Court of Appeals found critical the fact that the this code provision lacked a direct mandate to the building official to serve a notice of violation and disconnect the gas line, and other provisions in the code instead granted

the official the discretion to take these actions :

The statute does not provide a specific directive to the governmental employee as to what should be done. The statute merely vests discretion in the inspector in this situation. The [International Residential Code] gives the inspector authority to authorize disconnection and serve a notice or order when a violation is observed.

Pierce, 161 Wn. App. at 801.

As the opinion in *Pierce* indicates, the critical issue was: “not whether there were code violations which were ignored or passed over, but *whether the code mandated corrective action by the Building Official.*” *Pierce*, 161 Wn. App at 796 (quoting trial court’s ruling granting summary judgment to Yakima County)(emphasis added). Similarly, the critical issue here is not whether Betty *should* have been declared a potentially dangerous dog, but whether the ordinance *mandated* this action. It does not. What is missing in Former PCC 6.07.010 is a specific and direct mandate to declare a dog as potentially dangerous *whenever there is probable cause to do so.*

The Washington Supreme Court has stated that courts are to “construe the failure to enforce exception narrowly.” *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990). *Pierce* illustrates this narrow construction and demonstrates that vague or general language will not suffice for

application of the failure to enforce exception even if the word “shall” is present in the ordinance.

This principle is also illustrated in *Ravenscroft v. Washington Power Company*, 87 Wn. App. 402, 942 P.2d 991 (1997), *reversed on other grounds*, 136 Wn.2d 911, 969 P.2d 75 (1999). In *Ravenscroft*, the plaintiff was injured when his recreational speed boat hit a submerged, rooted tree stump, and he sued Spokane County alleging negligence in failing to mark the stump. The plaintiff argued boating safety provisions in the Washington Administrative Code (WAC) contained directives to the government to mark water hazards.

The Court of Appeals held that the plaintiff’s suit was barred by the public duty doctrine, and the failure to enforce exception did not apply. *Ravenscroft*, 87 Wn. App. at 416. The court noted that the plaintiff’s WAC provisions did contain directives pertaining to water safety, *but none was specific enough* with regard to the partially-submerged tree stump to trigger the failure to enforce exception:

[N]either [WAC] provision contains specific directives as to exactly which hazards must be marked. Nor does either provision direct corrective action when the buoys or markers are not in place or are removed where a hazard is present. . . . *In the absence of a directive to undertake specific corrective action, the failure to enforce exception does not apply.*

Ravenscroft, 87 Wn. App. at 416.

Numerous other cases illustrate the need for clear and precise language directed at a government employee in order to establish the specific mandate necessary for the failure to enforce exception to apply. *See e.g., McKasson v. State of Washington*, 55 Wn. App. 18, 25, 776 P.2d 971 (1989)(court holds no specific directive when the Securities Act statutes and regulations are “replete with ‘mays’ and vested broad discretion in the director to act” and plaintiff’s suit was therefore barred by public duty doctrine); *Forest v. State of Washington*, 62 Wn. App. 363, 814 P.2d 1181 (1991)(court finds failure to enforce exception inapplicable because no specific directive for State’s corrections officers to violate offender’s parole who later committed rape of plaintiff); *Smith v. City of Kelso*, 112 Wn. App. 277, 48 P.3d 372 (2002)(ordinance that requires that city engineer “**shall** prepare minimum. . . design and construction standards appropriate to the. . . soil conditions and geology of the area in which the plat is located” not specific enough for purposes of the failure to enforce exception to create mandatory duty to prepare development standards prior to plat approval.); *Halleran v. Nu West, Inc.*, 123 Wn. App. 701, 716, 98 P.3d 52 (2004)(holding failure to enforce exception inapplicable because Securities Act does not contain specific directive to a governmental employee as to what should be done); *Donohoe v. State of*

Washington, 135 Wn. App. 824, 142 P.3d 654 (2006)(court finds no mandatory duty to take a specific action, instead finds “government agent had broad discretion about whether and how to act.”) ; *Fishburn v. Pierce County*, 161 Wn. App. 452, 250 P.3d 146 (2011), *rev. denied* 172 Wn.2d 1012 (2011) (failure to enforce exception did not apply because “[neither statute cited by plaintiff] creates a mandatory duty to take specific action to correct a septic system violation”).

Former PCC 6.07.010 was amended in 2008, and this amendment establishes with even greater clarity that filing a declaration is a discretionary action, not a mandatory duty. Where a former statute is amended, such amendment is strong evidence of legislative intent of the first statute. *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 755-56, 953 P.2d 88 (1998).

The ordinance now reads in pertinent part:

The animal control authority *shall have the ability* to declare an animal as potentially dangerous *if there is probable cause* to believe the animal[] fails within the definition [of potentially dangerous animal]. . . .

PCC 6.07.010; Appendix B. The amended ordinance makes it clear that animal control has the “ability” to file a declaration, and there is no indication this “ability” can somehow be construed as a mandatory duty.

In reaching the conclusion that the failure to enforce exception

applied in this case, the trial court relied on *King v. Hutson*, 97 Wn. App. 590, 987 P.2d 655 (1999). *King* is distinguishable on its facts. At issue in *King* was a mandatory statutory duty *inapplicable* to this case: an animal control authority's statutory duty under RCW 16.08.100 to confiscate immediately a "dangerous dog" that is not compliant with statutory requirements. A dog can be classified as a "dangerous dog" (as distinguished from a "potentially dangerous dog") when the dog is reported to have inflicted severe injury on a human being without provocation, has killed a domestic animal without provocation, or has been previously found to be potentially dangerous after the owner received notice of such, and the dog again aggressively bites, attacks or endangers safety. RCW 16.08.070(2).

The plaintiff in *King* was attacked by two dogs and suffered severe and disfiguring injuries that required hospitalization. She sued the dogs' two owners, who reached a pre-trial settlement with her. *King*, 97 Wn. App. at 592. She also sued Stevens County arguing it was liable in negligence for failing to take preventive action with regard to one of the dogs.

The plaintiff argued Stevens County breached a mandatory statutory duty in not impounding this dog as a "dangerous dog" both prior to and *after* the attack on the plaintiff. The Court of Appeals upheld the

summary judgment dismissal of the plaintiff's first claim, finding that the County had no duty to confiscate the dog *prior* to the attack because the dog did not fit the statutory definition of "dangerous dog" prior to the attack. *King*, 97 Wn. App. at 595. The court, however, found that a question of material fact existed with regard to the second claim because the evidence supported an inference that the dog fit the definition of "dangerous dog" *after the vicious attack on plaintiff*.

This case is distinguishable from *King*. The statutory duty to impound a "dangerous dog" is not at issue in this case. There is no contention Betty met the "dangerous dog" criteria prior to the attack on plaintiff. In addition, she was impounded immediately after the attack on plaintiff and was eventually euthanized. *King* is distinguishable and does not support the trial court's ruling.

The plaintiff also relied on *Livingston v. City of Everett*, 50 Wn. App. 655, 751 P.2d 1199 (1988), and *Livingston* is also distinguishable on its facts. In *Livingston*, the animal control officer released a dog which he had reason to believe was dangerous, and the dog attacked a child. At issue was an ordinance that provided an impounded animal "shall be released . . . if, in the judgment of the animal control officer in charge, such animal is not dangerous or unhealthy." *Livingston*, 50 Wn. App. at 658 (quoting Everett Municipal Code § 6.04.140(E)(1)). The Court of

Appeals found that the municipal authority had a mandatory duty under this ordinance to not release a dangerous dog back to its owner. *Livingston*, 500 Wn. App. at 659. The ordinance at issue in *Livingston* is not at issue in this case. The County's code has no similar provision, and this case does not involve the release of an impounded animal. *Livingston* does not support the plaintiff's argument.

B. Prejudicial Error in The Jury Instructions Requires That the Jury's Verdict be Vacated.

Even if the County were *somehow* a proper party to this action despite the public duty doctrine, the jury's verdict should be vacated due to prejudicial error that occurred in instructing the jury on Pierce County's duty of care.

The appellate court reviews jury instructions *de novo*. *Hall v. Sacred Heart Med. Ctr.*, 100 Wn. App. 53, 61, 995 P.2d 621, *rev. denied*, 141 Wn.2d 1022 (2000). An erroneous statement of the applicable law is reversible error if it prejudices a party. *Robertson v. State Liquor Control Bd.*, 102 Wn. App. 848, 860, 10 P.3d 1079 (2000). An error is prejudicial if it affects the outcome of the trial. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Prejudicial error occurred in this case.

The trial court's Jury Instruction Number 5 contained prejudicial misstatements of law concerning the County's duty of care in this

negligence action:

The plaintiff Sue Gorman claims that the defendant Pierce County was negligent in one or more of the following respects:

- (1) failing to classify *and control* a potentially dangerous dog;
- (2) *failing to protect the public from a potentially dangerous dog;*
- (3) *failing to confiscate and confine a potentially dangerous dog.*”

CP 881, Appendix C (emphasis added). Each of these three provisions contains a prejudicial misstatement of the applicable law that unduly expanded the scope of the County’s duty.

The second provision, “failing to protect the public from a potentially dangerous dog,” allowed the jury to find Pierce County liable in negligence for breaching an expansive duty owed to the general public as a whole. “The threshold determination in a negligence action is whether a duty of care is owed by the defendant to the plaintiff.” *Taylor*, 111 Wn.2d at 163. “[T]o be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general. *Taylor*, 111 Wn.2d at 163. Instruction Number 5 constitutes reversible error because it contravenes this basic principle of negligence law and allowed the jury to find the County liable in negligence *to the plaintiff* without requiring a determination that the County breached a duty of care owed *specifically to her*.

The first and third provisions in Instruction Number 5 are also prejudicial misstatements of the law that expand Pierce County's duty beyond anything warranted under the ordinance. Even if Pierce County *somehow* had a mandatory duty to classify Betty as potentially dangerous, it did not have a duty to "control", "confiscate" or "confine" her. In fact, the potentially dangerous dog ordinance does not grant the County the authority to perform *any* of these actions unless two events first occur.

First, the dog owner must be served with a notice regarding a potentially dangerous dog declaration, the facts upon which the declaration was based, and information concerning the availability of a hearing at which the owner could contest these facts. Former PCC 6.7.010(C). The notice must also inform the owner of the restrictions placed on the animal as a result of the declaration and the penalties for violating the restrictions. Such penalties include the potential for having the owner fined or even imprisoned. Former PCC 6.7.010(C). Second, the County does *not* have the authority to impound a dog under the ordinance *unless* the owner or the dog violates one or more of the specific restrictions stated in the ordinance. *See generally* Former PCC Chapter 6.07, Appendix A. In addition, the declaration does not become final until the hearing and appeal process is complete, and the declaration is subject to dismissal at any time during this process due to a failure of the evidence

or other deficiency. See Former PCC 6.07.010, Appendix A.

There was no declaration served in this case on Wilson. As a necessary consequence, there was no legal authority for instructing the jury that the County had the duty to “control”, “confiscate” or “confine” Betty under the potentially dangerous dog ordinance. The instruction was erroneous.

The County was prejudiced by Instruction Number 5 because the court also instructed the jury that the plaintiff’s applicable burden of proof consisted of showing “that the defendant Pierce County acted, or failed to act, in one of the ways claimed by the plaintiff.” CP 888 (Court’s Instruction Number 11), Appendix C. In other words, the jury was **referred specifically back** to the three erroneous provisions in Instruction Number 5 to make its determination of whether Pierce County breached a duty of care and was negligent.

This prejudicial error was further compounded by the fact that the trial court instructed the jury that it could find Pierce County liable based on the alleged breach stated in Instruction Number 5 *without* the necessity of determining whether any such breach was *the proximate cause of plaintiff’s injuries*.

In a negligence action, the plaintiff has the burden of proof that the plaintiff’s breach of a duty of care was the proximate cause of his or her

injury. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984).

Proximate cause is an essential element in a negligence action. *Pedroza*, 101 Wn.2d at 228. With regard to proximate cause, the jury was instructed:

The plaintiff has the burden of proving each of the following propositions:

. . . that the negligence of Pierce County *and/or the fault of the other defendants* was a proximate cause of the injury to the plaintiff.

CP 888 (Instruction Number 11)(emphasis added), Appendix C. In using the term “and/or”, the court instructed the jury that to find liability against Pierce County, it could find **either** the dog owners’ “fault” was a proximate cause of the plaintiff’s injuries, **or** it could find that Pierce County’s action or inaction was a proximate cause of the injuries. In other words, the jury was not even required to consider whether Pierce County’s actions or inactions were a proximate cause of plaintiff’s injuries so long as the dog owners were at fault. This error was unquestionably prejudicial to the County because the co-defendant dog owners each **stipulated to fault** under the strict liability dog bite statute, and the jury was **specifically instructed** that each of these owners *was in fact* “at fault.”

CP 902. The court’s instructions allowed the jury to find Pierce County breached non-existent duties of care that were not owed specifically to the plaintiff, and then allowed the jury to bypass the question of whether this

breach was a proximate cause of the plaintiff's injuries. The trial court's errors necessitate reversal and vacation of the jury's verdict.

C. The Trial Court Erred in Admitting Evidence Concerning Reports Made in 2000 to 2006 Concerning Dogs Wilson Owned Prior to Betty.

A trial court's decision to admit or exclude evidence is reviewed under the abuse of discretion standard. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Stenson*, 132 Wn.2d at 701. Over the County's objection, the trial court allowed the plaintiff to introduce evidence of 10 instances spanning from 2000 to 2006 in which various dogs Wilson owned *prior to* Betty were reported to animal control. None of these reports were made by the plaintiff. The trial court's ruling admitting this evidence was error.

Even if the County somehow had a duty to declare *Betty* as potentially dangerous, evidence of dogs that Wilson owned prior to Betty has no relevance for purposes of this supposed duty, and its admission was unfairly prejudicial. "Relevant evidence" tends to "make the existence of any fact ... of consequence to the determination of the action more or less probable than it would be without [it]." ER 401. Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER

403.

Former PCC 6.07.010 allows the County to declare a dog as “potentially dangerous “ only if there was probable cause to believe *that a particular dog* is potentially dangerous. The ordinance requires the declaration to be supported by a written finding containing information concerning *that particular dog*. See Former PCC 6.07.010(A). If the dog owner contests the declaration, the declaration “shall be rescinded” unless the evidence is sufficient to support the declaration against *that particular dog*. See Former PCC 6.07.010(D)(2). Evidence concerning dogs other than Betty would not have supported a declaration filed against Betty herself. A potentially dangerous dog determination is based on the specific actions of a particular dog, not prior dogs owned by the same owner. RP 747.

Admission of this evidence prejudiced Pierce County and requires reversal. Error is considered prejudicial if it affects the outcome of the trial. See *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). In this case, evidence concerning other dogs and other complainants caused undue prejudice and confusion of the issues. The 10 prior reports did not concern Betty, and none were made by the plaintiff. Wilson stipulated to fault under the strict liability statute, and any negligence on her part was not an issue before the jury. The jury

was told, however, in Instruction Number 5 that Pierce County owed a duty *to the public at large* concerning potentially dangerous dogs. As such, the jury was allowed to find Pierce County breached a duty of care based on these reports, which were evidently filed by various members of the public. The trial court's ruling admitting this evidence should be reversed.

VI. CONCLUSION

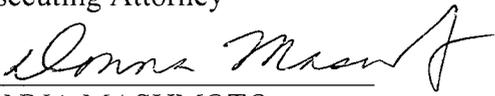
Pierce County respectfully requests that the court reverse the trial court's ruling under the public duty doctrine and remand this case for dismissal as to Defendant Pierce County. The trial court erred in finding the failure to enforce exception to the public duty doctrine applicable because Former PCC 6.07.010 did not impose a mandatory duty in this case.

In the alternative, the trial court committed prejudicial error in instructing the jury on Pierce County's duty of care and in admitting

evidence of reports unrelated to Betty. These errors necessitate reversal and vacation of the jury's verdict.

DATED: January 30, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Appellant Pierce County was delivered this 30th day of January, 2012, to Legal Messengers, Inc., with appropriate instruction to forward the same to counsel as follows:

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I declare under penalty of perjury under the laws of the State of

Washington that the foregoing is true and correct.


CHANDRA ZIMMERMAN

12 JAN 30 PM 3:45
STATE OF WASHINGTON
BY DEPUTY
COURT OF APPEALS
DIVISION II

APPENDIX A

FORMER PIERCE COUNTY CODE:

CHAPTER 6.02
“Animal Control – General Provisions”

CHAPTER 6.03
“Animal Control”

CHAPTER 6.07
“Potentially Dangerous Dogs”

FORMER PIERCE COUNTY CODE
Chapter 6.02: Animal Control - General Provisions

Chapter 6.02

ANIMAL CONTROL - GENERAL PROVISIONS

Sections:

- 6.02.010 Definitions.**
- 6.02.020 Authorized Agents May Perform Duties.**
- 6.02.025 Licenses Required.**
- 6.02.030 Authority to Pursue.**
- 6.02.040 Notice of Impounding Animal.**
- 6.02.050 Hindering an Officer.**
- 6.02.060 Interference With Impounding.**
- 6.02.070 Redemption of Dogs.**
- 6.02.075 Redemption of Livestock.**
- 6.02.080 Redemption of Animals Other Than Dogs and Livestock.**
- 6.02.085 Mandatory Spay/Neuter for Impounded Dogs and Cats - Deposit - Refund - Exception.**
- 6.02.088 Conditions of Release.**
- 6.02.090 Injured or Diseased Animals.**
- 6.02.100 Duties Upon Injury or Death to an Animal.**
- 6.02.110 Poisoning of Animals.**
- 6.02.120 Abatement of Nuisances.**
- 6.02.130 Penalty for Violation.**
- 6.02.140 Severability.**

6.02.010 Definitions.

As used in this Title, the following terms shall have the following meanings:

- A. "Adult" means any animal over the age of seven months.
- B. "Altered" shall mean to permanently render incapable of reproduction (i.e., spayed or neutered).
- C. "Animal" means any nonhuman mammal, bird, reptile or amphibian excluding livestock and poultry as defined herein.
- D. "Animal Control Agency" means that animal control organization authorized by Pierce County to enforce its animal control provisions.
- E. "Animal Shelter" means that animal control facility authorized by Pierce County.
- F. "At large" means off the premises of the owner or keeper of the animal, and not under restraint by leash or chain or not otherwise controlled by a competent person.
- G. "Auditor" means Pierce County Auditor.
- H. "Cat" means and includes female, spayed female, male and neutered male cats.
- I. "Competent person" means a person who is able to sufficiently care for, control, and restrain his/her animal, and who has the capacity to exercise sound judgement regarding the rights and safety of others.
- J. "County" means Pierce County.
- K. "Court" means District Court or the Superior Court, which courts shall have concurrent jurisdiction hereunder.
- L. "Dog" means and includes female, spayed female, male and neutered male dogs.

FORMER PIERCE COUNTY CODE
Chapter 6.02: Animal Control - General Provisions

Title 6 - Animals
6.02.020

- M. "Gross Misdemeanor" means a type of crime classification, while not a felony, is ranked as a serious misdemeanor. The maximum penalty for a gross misdemeanor is 365 days in jail and/or a \$5,000.00 fine.
- N. "Humane trap" means a live animal box enclosure trap designed to capture and hold an animal without injury.
- O. "Impound" means to receive into the custody of the Animal Control Shelter, or into the custody of the Director or his/her authorized agent or deputy.
- P. "Juvenile" means any animal from weaning to seven months of age.
- Q. "Livestock" means all cattle, sheep, goats, or animals of the bovidae family; all horses, mules, other hoof animals, or animals of the equidae family; all pigs, swine, or animals of the suidae family; llamas; and ostriches, rhea, and emu.
- R. "Misdemeanor" means a maximum penalty of 90 days in jail and/or a \$1,000.00 fine, pursuant to Section 1.12.010 of this Code.
- S. "Owner" means any person, firm, or corporation owning, having an interest in, or having control or custody or possession of any animal.
- T. "Potentially Dangerous Dog" means any dog that when unprovoked: (a) Inflicts bites on a human, domestic animal, or livestock either on public or private property, or (b) chases or approaches a person upon the streets, side-walks, or any public grounds or private property in a menacing fashion or apparent attitude of attack, or (c) any dog with a known propensity, tendency, or disposition to attack unprovoked or to cause injury or otherwise to threaten the safety of humans, domestic animal, or livestock on any public or private property.
- U. "Poultry" means domestic fowl normally raised for eggs or meat, and includes chickens, turkeys, ducks and geese.
- V. "Securely enclosed and locked" means a pen or structure which has secure sides and a secure top. If the pen or structure has no bottom secured to the sides, then the sides must be embedded in the ground no less than one foot.
- W. "Unconfined" means not securely confined indoors or in a securely enclosed and locked pen or structure upon the premises of the person owning, harboring or having the care of the animal.

(Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 1 (part), 1999; Ord. 95-151S § 2 (part), 1996; Ord. 92-35 § 1 (part), 1992, Ord. 89-235 § 3, 1990; Ord. 87-40S § 1 (part), 1987)

6.02.020 Authorized Agents May Perform Duties.

Wherever a power is granted to or a duty imposed upon the Sheriff, the power may be exercised or the duty may be performed by a Deputy of the Sheriff or by an authorized agent of Pierce County, deputized by the Sheriff. (Ord. 87-40S § 1 (part), 1987)

6.02.025 Licenses Required.

Licenses required are for regulation and control. This entire Title shall be deemed an exercise of the power of the State of Washington and of the County of Pierce to license for regulation and/or control and all its provisions shall be liberally construed for the accomplishment of either or both such purposes. (Ord. 2005-108 § 1 (part), 2005)

6.02.030 Authority to Pursue.

Those employees or agents of the County charged with the duty of seizing animals running at large may pursue such animals onto County-owned property, vacant property, and unenclosed private property, and seize, remove, and impound the same. (Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

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6.02.040 Notice of Impounding Animal.

Upon the impoundment of any animal under the provisions of this Title, the animal control agency shall immediately notify the owner, if the owner is known, of the impounding of such animal, and of the terms upon which said animal can be redeemed. The impounding authority shall retain said animal for 48 hours following actual notice to the owner. The notifying of any person over the age of 18 who resides at the owner's domicile shall constitute actual notice to the owner. If the owner of said animal so impounded is unknown, then said animal control agency shall make a reasonable effort to locate and notify the owner of said animal. (Ord. 99-17 § 1 (part); 1999; Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

6.02.050 Hindering an Officer.

It shall be unlawful for any person to interfere with, hinder, delay, or impede any officer who is enforcing the provisions of this Title as herein provided. (Ord. 87-40S § 1 (part), 1987)

6.02.060 Interference With Impounding.

It is unlawful for any person to willfully prevent or hinder the impounding of any animal, or to by force or otherwise remove any animal from the animal shelter without authority of the person in charge of the animal shelter, or without payment of all lawful charges against such animal, or to willfully resist or obstruct any officer in the performance of any official duty. (Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

6.02.070 Redemption of Dogs.

The owner of any dog impounded under this Title may redeem said dog within 48 hours from time of impounding by paying to the animal control agency the appropriate redemption fee. The first time a dog is impounded within a one year period, the redemption fee is \$25.00; for the second impound within a one year period the redemption fee is \$50.00; for the third and subsequent impounds within a one year period the redemption fee is \$75.00. If a dog is wearing a current pet license at the time of the first impound, no redemption fee will be collected. In addition to the redemption fee, the redeemer shall pay, as a boarding charge for the caring and keeping of such dog, the sum of \$6.00 per day for each day, including the first and last days, that the dog is retained by the impounding authority. This boarding charge will be collected for the first time impound whether the animal is wearing a pet license or not. If an impounded dog is not redeemed by the owner within 48 hours, then any person may redeem it within the next 48 hours by complying with the above provision. In case such dog is not redeemed within 96 hours, it may be humanely destroyed or otherwise disposed of within the discretion of the animal control agency. (Ord. 99-17 § 1 (part), 1999; Ord. 97-111 § 2, 1997; Ord. 88-138 § 1, 1988; Ord. 87-40S § 1 (part), 1987)

6.02.075 Redemption of Livestock.

The owner of livestock impounded under this Title may redeem said livestock within 48 hours from time of impounding by paying to the impounding authority a redemption fee of \$35.00 per animal for small livestock (i.e., goats, sheep, swine, ostriches, rhea, emu, etc.) and a redemption fee of \$75.00 per animal for larger livestock (i.e., cattle, horses, mules, llamas, etc.). In addition, the cost of a private livestock hauler, if one is used, is to be paid at the time of redemption. In addition to the redemption fee, the redeemer shall pay, as a boarding charge for the caring and keeping of such animal, the sum of \$6.00 for each day, including the first and last days, that the animal is cared for at the impounding authority. The livestock may be cared for by a private boarding facility, in which case that facility's boarding fees shall be paid at the time of redemption. (Ord. 99-17 § 1 (part), 1999)

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6.02.080 Redemption of Animals Other Than Dogs and Livestock.

The owner of any animal other than a dog or livestock impounded under the provisions of this Title may redeem it within 48 hours from the time of impounding by paying to the animal control agency a redemption fee of \$15.00. In addition to the redemption fee, the redeemer shall pay, as a boarding charge for the caring and keeping of such animal, the sum of \$4.00 per day for each day, including the first and last days, that the animal is retained by the impounding authority. If such animal is not redeemed by the owner within 48 hours, it may be humanely destroyed or otherwise disposed of at the discretion of the animal control agency; provided, however, that any animal so impounded less than two months of age, at the discretion of the animal control agency, may be humanely destroyed or otherwise disposed of at any time after impounding. (Ord. 99-17 § 1 (part), 1999; Ord. 95-151S § 2 (part), 1996; Ord. 88-138 § 2, 1988; Ord. 87-40S § 1 (part), 1987)

6.02.085 Mandatory Spay/Neuter for Impounded Dogs and Cats - Deposit - Refund - Exception.

- A. **Mandatory Spay/Neuter - Deposit.** No unaltered dog or cat that is impounded more than once in any 12-month period may be redeemed by any person until the sum of \$35.00 is deposited with the Auditor, or to the Auditor's designated licensing agent, to cover the cost of spaying or neutering the animal.
- B. **Refund.** The alteration deposit shall be refunded upon a showing of proof of alteration from a licensed veterinarian.
- C. **Exception.** The alteration deposit shall not be required if the owner or other person redeeming the animal provides a written statement from a licensed veterinarian that the spay or neuter procedure would be harmful to the animal.

(Ord. 2005-108 § 1 (part), 2005; Ord. 92-35 § 1 (part), 1992)

6.02.088 Conditions of Release.

The animal control agency is authorized to refuse to release to its owner any animal which has been impounded more than once in a 12-month period unless satisfied that the owner has taken steps that the violation will not occur again. The agency may impose reasonable conditions which must be satisfied by the owner before release of the animal, including conditions assuring that the animal will be confined. Any violation of the conditions of release is unlawful and shall constitute a Class 3 Civil Infraction pursuant to Chapter 1.16 PCC. (Ord. 99-17 § 1 (part), 1999)

6.02.090 Injured or Diseased Animals.

Any animal suffering from serious injury or disease may be humanely destroyed by the animal control agency; provided, that the animal control agency shall immediately notify the owner, if the owner is known, and if the owner is unknown, make a reasonable effort to locate and notify the owner. (Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

6.02.100 Duties Upon Injury or Death to an Animal.

The operator of a vehicle involved in an accident resulting in injury or death to an animal or livestock, shall immediately stop the vehicle at or as near to the scene of the accident as possible, and return thereto, and shall give to the owner or other competent person having custody of the animal, the name and address of the operator of the vehicle and the registration number of the vehicle involved in the accident. If the owner or other competent person is not the person at the scene of the accident, the operator shall take reasonable steps to locate the owner or custodian of

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the said animal and shall supply the information herein above required. If the animal is injured to the extent that it requires immediate medical attention and there is no owner or custodian present to look after it, the operator of said vehicle shall immediately report the situation to the Pierce County Sheriff's Office. (Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

6.02.110 Poisoning of Animals.

No person shall place or expose or cause to be placed or exposed in any yard or lot of vacant or enclosed land, or on any exposed place or public place, or on any street, alley, or highway, or other place where the same may be taken internally by a child, person, or by any domestic animal, or fowl, any poisonous substance which, if taken internally may cause death or serious sickness. The provisions of this Section shall not apply to the killing by poison of any domestic animal, or fowl in a lawful and humane manner by its owner or by a duly authorized agent of such owner or by a person acting pursuant to instructions from a duly constituted public authority. (Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

6.02.120 Abatement of Nuisances.

Any person convicted of a misdemeanor for violating any of the provisions of this Title in the keeping or maintenance of any nuisance as herein defined shall, in addition to any fine or imprisonment imposed by the Court in such action, be ordered to forthwith abate and remove the nuisance; and if the same is not done by the offender within 24 hours, the same shall be abated and removed under the direction the officer authorized by the order of said Court, which order of abatement shall be entered upon the docket of the Court and made a part of the judgement in the action.

Any such person shall be liable for all costs and expenses of abating the same when the nuisance has been abated by any officer of Pierce County or the animal control agency of Pierce County, which costs and expenses shall be taxed as part of the costs of the prosecution against the party, liable to be recovered as other costs are recovered; and in all cases where the officer is authorized by the Court, shall abate any nuisance and he/she shall keep an account of all expenses attending the abatement; and in addition to other powers herein given to collect the costs and expenses, Pierce County may bring suit for the same in any Court of competent jurisdiction against the person keeping or maintaining the nuisance so abated. (Ord. 87-40S § 1 (part), 1987)

6.02.130 Penalty for Violation.

A person who violates any of the provisions of Sections 6.02.050, 6.02.060, 6.02.100, and 6.02.110 of this Chapter shall, upon conviction thereof, be found guilty of a misdemeanor. (Ord. 87-40S § 1 (part), 1987)

6.02.140 Severability.

If any provision of this Title or its application to any person or circumstances are held to be invalid, the remainder of this Title or the application of the provisions to other persons or circumstances shall not be affected. (Ord. 87-40S § 1 (part), 1987)

Chapter 6.07

POTENTIALLY DANGEROUS DOGS

Sections:

- 6.07.010 Declaration of Dogs as Potentially Dangerous - Procedure.**
- 6.07.020 Permits and Fees.**
- 6.07.030 Confinement and Identification of Potentially Dangerous Dogs.**
- 6.07.035 Notification of Status of a Potentially Dangerous Dog.**
- 6.07.040 Penalty for Violation.**

6.07.010 Declaration of Dogs as Potentially Dangerous - Procedure.

- A. The County or the County's designee shall classify potentially dangerous dogs. The County or the County's designee may find and declare an animal potentially dangerous if an animal care and control officer has probable cause to believe that the animal falls within the definitions set forth in Section 6.02.010 Q. The finding must be based upon:
 - 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of Section 6.02.010 Q.; or
 - 2. Dog bite reports filed with the County or the County's designee; or
 - 3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
 - 4. Other substantial evidence.
- B. The declaration of a potentially dangerous dog shall be in writing and shall be served on the owner in one of the following methods:
 - 1. Certified mail to the owner's last known address; or
 - 2. Personally; or
 - 3. If the owner cannot be located by one of the first two methods, by publication in a newspaper of general circulation.
- C. The declaration shall state at least:
 - 1. The description of the animal.
 - 2. The name and address of the owner of the animal, if known.
 - 3. The whereabouts of the animal if it is not in the custody of the owner.
 - 4. The facts upon which the declaration of potentially dangerous dog is based.
 - 5. The availability of a hearing in case the person objects to the declaration, if a request is made within ten days.
 - 6. The restrictions placed on the animal as a result of the declaration of a potentially dangerous dog.
 - 7. The penalties for violation of the restrictions, including the possibility of destruction of the animal, and imprisonment or fining of the owner.
- D. If the owner of the animal wishes to object to the declaration of a potentially dangerous dog:
 - 1. The owner may request a hearing before the Director's designee County, or the County's designee, by submitting a written request and payment of a \$25.00 administrative review fee to the Auditor or the Auditor's designee within ten days of receipt of the declaration, or within ten days of the publication of the declaration pursuant to Section 6.07.010 B.3.

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2. If the County or the County's designee finds that there is insufficient evidence to support the declaration, it shall be rescinded, and the restrictions imposed thereby annulled.
3. If the County or the County's designee finds sufficient evidence to support declaration, the owner may appeal such decision pursuant to Pierce County Hearing Examiner Code; provided that the appeal and the payment of an appeal fee of \$75.00 must be submitted to the Auditor or the Auditor's designee within ten working days after the County or the County's designee finds sufficient evidence to support the declaration.
4. An appeal of the Hearing Examiner's decision must be filed in Superior Court within 30 days of the date of the Hearing Examiner's written decision.
5. During the entire appeal process, it shall be unlawful for the owner appealing the declaration of potentially dangerous dogs to allow or permit such dog to:
 - a. Be unconfined on the premises of the owner; or
 - b. Go beyond the premises of the owner unless such dog is securely leashed and humanely muzzled or otherwise securely restrained.

(Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 92-35 § 4, 1992; Ord. 89-235 § 2 (part), 1990; Ord. 89-192 § 1, 1989; Ord. 87-40S § 4 (part), 1987)

6.07.020 Permits and Fees.

Following a declaration of a potentially dangerous dog and the exhaustion of the appeal therefrom, the owner of a potentially dangerous dog shall obtain a permit for such dog from the animal control agency, and shall be required to pay the fee for such permit in the amount of \$250.00 to the Auditor or the Auditor's designee. In addition, the owner of a potentially dangerous dog shall pay an annual renewal fee for such permit in the amount of \$50.00 to the Auditor or the Auditor's designee.

Should the owner of a potentially dangerous dog fail to obtain a permit for such dog or to appeal the declaration of a potentially dangerous dog, the County or the County's designee is authorized to seize and impound such dog and, after notification to the owner, hold the dog for a period of no more than five days before destruction of such dog.

(Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

6.07.030 Confinement and Identification of Potentially Dangerous Dogs.

- A. Following a declaration of a potentially dangerous dog and the exhaustion of the appeal therefrom, it shall be unlawful for the person owning or harboring or having care of such potentially dangerous dog to allow and/or permit such dog to:
 1. Be unconfined on the premises of such person; or
 2. Go beyond the premises of such person unless such dog is securely leashed and humanely muzzled or otherwise securely restrained.
- B. Potentially dangerous dog(s) must be tattooed or have a microchip implanted for identification. Identification information must be on record with the Pierce County Auditor.

(Ord. 2005-108 § 1 (part), 2005; Ord. 97-111 § 5, 1997; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

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6.07.035 Notification of Status of a Potentially Dangerous Dog.

- A. The owner of a dog that has been classified as a potentially dangerous dog shall immediately notify the Auditor and Sheriff when such dog:
1. Is loose or unconfined; or
 2. Has bitten or otherwise injured a human being or attacked another animal or livestock.
- B. The owner of a dog that has been classified as a potentially dangerous dog shall immediately notify the Auditor or the Auditor's designee when such dog:
1. Is sold or given away or dies; or
 2. Is moved to another address.

Prior to a potentially dangerous dog being sold or given away, the owner shall provide the name, address, and telephone number of the new owner to the Auditor or the Auditor's designee. The new owner shall comply with all of the requirements of this Chapter.

(Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990)

6.07.040 Penalty for Violation.

Any person who violates a provision of this Chapter shall, upon conviction thereof, be found guilty of a misdemeanor. In addition, any person found guilty of violating this Chapter shall pay all expenses, including shelter, food, veterinary expenses for identification or certification of the breed of the animal or boarding and veterinary expenses necessitated by the seizure of any dog for the protection of the public, and such other expenses as may be required for the destruction of any such dog. Provided, that any potentially dangerous dog which is in violation of the restrictions contained in Section 6.07.020 of this Code or restrictions imposed as part of a declaration as a potentially dangerous dog, shall be seized and impounded. Furthermore, any potentially dangerous dog which attacks a human being, domestic animal, or livestock may be ordered destroyed when, in the court's judgement, such potentially dangerous dog represents a continuing threat of serious harm to human beings or domestic animals. (Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

APPENDIX B

CURRENT PIERCE COUNTY CODE:

CHAPTER 6.07

“Dangerous and Potentially Dangerous Animals”

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Chapter 6.07

DANGEROUS AND POTENTIALLY DANGEROUS ANIMALS

Sections:

- 6.07.010 Declaration of Animals as Potentially Dangerous – Procedure.
- 6.07.015 Declaration of Animals as Dangerous – Procedure.
- 6.07.020 Registration, Permits and Fees for Potentially Dangerous Animals.
- 6.07.025 Registration, Permits and Fees for Dangerous Animals.
- 6.07.030 Confinement and Identification of Dangerous or Potentially Dangerous Animals.
- 6.07.035 Notification of Status of a Dangerous or Potentially Dangerous Animal.
- 6.07.040 Penalty for Failure to Control or Comply with Restrictions.
- 6.07.045 Impoundment of Dangerous or Potentially Dangerous Animals.

6.07.010 Declaration of Animals as Potentially Dangerous – Procedure.

- A. The animal control authority shall have the ability to declare an animal as potentially dangerous if the animal control officer has a reasonable belief that the animal's conduct falls within the definition of a potentially dangerous animal as set forth in Section 6.02.010 X. and that the exclusion contained in Section 6.07.010 B. does not apply. The finding must be based upon:
 - 1. The written or verbal complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of Section 6.02.010 X.; or
 - 2. Animal bite reports filed with the County or the County's designee; or
 - 3. Actions of the animal witnessed by any animal control officer or law enforcement officer; or
 - 4. Other substantial evidence.
- B. **Exclusions.** An animal shall not be declared potentially dangerous if the threat, injury, or bite alleged to have been committed by the animal was sustained by a person who was at the time committing a willful trespass or other tort upon the premises occupied by the owner of the animal, or who was tormenting, abusing, or assaulting the animal, or who was committing or attempting to commit a crime.
- C. The declaration of a potentially dangerous animal shall be in writing and shall be served on the owner in one of the following methods:
 - 1. Regular and certified mail to the owner's last known address. Service shall be deemed complete upon the third day following the day upon which the notice was placed in the mail; or
 - 2. Personally; or
 - 3. If the owner cannot be located by one of the first two methods, by posting the declaration in a conspicuous location at the owner's residence.
- D. The declaration shall state at least:
 - 1. The description of the animal.
 - 2. The name and address of the owner of the animal, if known.
 - 3. The whereabouts of the animal if it is not in the custody of the owner.
 - 4. A brief statement of facts upon which the declaration of potentially dangerous animal is based.

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5. A reference to the Code Section that contains the definition of a potentially dangerous animal and to this Section.
 6. The availability of a hearing in case the person objects to the declaration, if a request is made within ten calendar days.
 7. The restrictions placed on the animal as a result of the declaration of a potentially dangerous animal.
 8. The penalties for violation of the restrictions, including the possibility of destruction of the animal, and imprisonment or fining of the owner.
- E.
1. The owner of the animal may appeal the declaration of potentially dangerous animal by filing an appeal of the declaration to the Pierce County Hearing Examiner.
 - a. The owner must submit a written appeal and pay a \$250.00 appeal fee at the Auditor's office within ten calendar days of service of the declaration.
 - b. Except as provided by this Chapter, the appeal shall proceed in accordance with the Pierce County Hearing Examiner Code, Chapter 1.22 PCC.
 - c. Notice of the public hearing shall be mailed to the owner at the address listed on the notice of appeal.
 - d. At the public hearing, the scope of evidence and the scope of review shall be de novo.
 - e. The burden shall be on the County to prove, by a preponderance of evidence, that the animal is a potentially dangerous animal as defined in PCC 6.02.010 X. and that the exclusion contained in PCC 6.07.010 B. does not apply.
 - f. The Hearing Examiner shall render a decision on the appeal within 30 calendar days following the conclusion of all testimony and hearings and closing of the record unless a longer period of time is agreed to by the parties.
 2. The Auditor may adopt a policy that allows a reduction of the fees listed in this Section where the owner resides in a low income household.
 3. The decision of the Hearing Examiner shall be considered final and conclusive unless a writ of review is filed in Superior Court within 20 calendar days of the Examiner's decision.
 4. If the owner prevails on appeal, the appeal fees listed in this Section shall be refunded to the owner.
 5. During the entire appeal process, it shall be unlawful for the owner appealing the declaration of a potentially dangerous animal to allow or permit such animal to go beyond the premises of the owner unless such animal is securely leashed, under the control of a competent adult, and humanely muzzled or otherwise securely restrained. Upon noncompliance with this subsection, the animal control authority is authorized to impound the animal subject to the procedures set forth in PCC 6.02.040 through 6.02.088.

(Ord. 2011-43s § 1 (part), 2011; Ord. 2008-14 § 1 (part), 2008; Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 92-35 § 4, 1992; Ord. 89-235 § 2 (part), 1990; Ord. 89-192 § 1, 1989; Ord. 87-40S § 4 (part), 1987)

6.07.015 Declaration of Animals as Dangerous – Procedure.

- A. The animal control authority shall have the ability to declare an animal as dangerous if the animal control officer has a reasonable belief that the animal's conduct falls within the definition of a dangerous animal as set forth in Section 6.02.010 N. and the exclusion contained in PCC 6.07.015 B. does not apply. The finding must be based upon:

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1. The written or verbal complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of Section 6.02.010 N; or
 2. Animal bite reports filed with the County or the County's designee; or
 3. Actions of the animal witnessed by any animal control officer or law enforcement officer; or
 4. Other substantial evidence.
- B. **Exclusions.** An animal shall not be declared dangerous if the threat, injury, or bite alleged to have been committed by the animal was sustained by a person who was at the time committing a willful trespass or other tort upon the premises occupied by the owner of the animal, or who was tormenting, abusing, or assaulting the animal, or who was committing or attempting to commit a crime.
- C. The declaration of a dangerous animal shall be in writing and shall be served on the owner in one of the following methods:
1. Regular and certified mail to the owner's last known address. Service shall be deemed complete upon the third day following the day upon which the notice was placed in the mail; or
 2. Personally; or
 3. If the owner cannot be located by one of the first two methods, by posting the declaration in a conspicuous location at the owner's residence.
- D. The declaration shall state at least:
1. The description of the animal.
 2. The name and address of the owner of the animal, if known.
 3. The whereabouts of the animal if it is not in the custody of the owner.
 4. A brief statement of facts upon which the declaration of dangerous animal is based.
 5. A reference to the Code Section that contains a definition of a dangerous animal and to this Section.
 6. The availability of an appeal in case the person objects to the declaration, if a request is made within ten calendar days.
 7. The restrictions placed on the animal as a result of the declaration of a dangerous animal.
 8. The penalties for violation of the restrictions, including the possibility of destruction of the animal, and imprisonment or fining of the owner.
- E. If the owner of the animal wishes to object to the declaration of a dangerous animal:
1. The owner of the animal may appeal the declaration of dangerous animal by filing an appeal of the declaration to the Pierce County Hearing Examiner.
 - a. The owner must submit a written appeal and pay a \$500.00 appeal fee at the Auditor's office within ten calendar days of service of the declaration.
 - b. Except as provided by this Chapter, the appeal shall proceed in accordance with the Pierce County Hearing Examiner Code, Chapter 1.22 PCC.
 - c. Notice of the public hearing shall be mailed to the owner's address as listed on the notice of appeal.
 - d. At the public hearing, the scope of evidence and the scope of review shall be de novo.
 - e. The burden shall be on the County to prove, by a preponderance of evidence, that the animal is a dangerous animal as defined in PCC 6.02.010 N. and that the exclusion contained in PCC 6.07.015 B. does not apply.

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- f. The Hearing Examiner shall render a decision on the appeal within 30 calendar days following the conclusion of all testimony and hearings and closing of the record unless a longer period of time is agreed to by the parties.
 2. The Auditor may adopt a policy that allows a reduction of the fees listed in this Section where the owner resides in a low income household.
 3. The decision of the Hearing Examiner shall be considered final and conclusive unless a writ of review is filed in Superior Court within 20 calendar days of the decision.
 4. If the owner prevails on appeal, the fees listed in this Section shall be refunded to the owner.
 5. During the entire appeal process, it shall be unlawful for the owner appealing the declaration of a dangerous animal to allow or permit such animal to go beyond the premises of the owner unless such animal is securely leashed, under the control of a competent adult, and humanely muzzled or otherwise securely restrained. Upon noncompliance with this subsection, the animal control authority is authorized to impound the animal subject to the procedures set forth in PCC 6.02.040 through 6.02.088.
- F. In the case wherein an animal is found to be a dangerous animal pursuant to the procedures in 6.07.015 because the animal killed a human being without provocation, after the exhaustion of appeal therefrom, the dangerous animal shall be forfeited to the County and be humanely euthanized.
- (Ord. 2011-43s § 1 (part), 2011; Ord. 2009-17 § 1, 2009; Ord. 2008-14 § 1 (part), 2008)

6.07.020 Registration, Permits and Fees for Potentially Dangerous Animals.

Following the declaration of a potentially dangerous animal and the exhaustion of the appeal therefrom, the owner of a potentially dangerous animal shall obtain a permit for such animal from the animal control agency, and shall be required to pay the fee for such permit in the amount of \$250.00 to the Auditor or the Auditor's designee. In addition, the owner of a potentially dangerous animal shall pay an annual renewal fee for such permit in the amount of \$250.00 to the Auditor or the Auditor's designee.

Should the owner of a potentially dangerous animal fail to obtain a permit for such animal or to appeal the declaration of a potentially dangerous animal, the County or the County's designee is authorized to seize and impound such animal and, after notification to the owner, hold the animal for a period of no more than five days before destruction of such animal.

A registration and permit will be issued to the owner of a potentially dangerous animal upon payment of the permit and inspection fees if the owner is able to pass a site inspection within the prescribed timeframe by meeting the following inspection criteria:

- A. A proper enclosure of the animal with a posted warning sign as defined in Sections 6.02.010 Z. and DD.;
- B. Proof that either:
 1. The animal has been microchipped (and microchip number is provided), or
 2. The animal has an identifying tattoo, either inside the left ear or inside the left, rear, upper thigh of the animal and a color, digital photo of the tattoo (in electronic format) is provided for identification purposes;
- C. Two current, color, digital photographs (in electronic format) of the animal (minimum 3" x 5" in size), for identification purposes;
- D. Proof of current rabies vaccination;
- E. Proof the animal has been spayed or neutered.

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- F. Proof of a policy of liability insurance (such as homeowner's insurance) issued by an insurer qualified under Title 48 RCW in the amount of at least \$250,000.00 (with Pierce County listed as the certificate holder), insuring the owner for any personal injuries inflicted by the potentially dangerous animal, or proof of a surety bond issued by a surety insurer qualified under Chapter 48.28 RCW in a form acceptable to the animal control authority in the sum of at least \$250,000.00 and payable to any person injured by the potentially dangerous animal.
- G. Animal must be humanely muzzled, as defined in Section 6.02.010 V., when outside of its primary residence.
- II. Animal must wear a brightly colored collar (not less than two inches in width) with current license tag at all times.

Muzzle and collar must be available at time of inspection.

An owner who fails to pass inspection will be subject to a \$50.00 re-inspection fee per occurrence. Re-inspection must occur during the prescribed ten calendar day period; it does not extend the allotted timeframe.

(Ord. 2008-14 § 1 (part), 2008; Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

6.07.025 Registration, Permits and Fees for Dangerous Animals.

Following the declaration of a dangerous animal and the exhaustion of the appeal therefrom, the owner of a dangerous animal shall obtain a permit for such animal from the animal control agency, and shall be required to pay the fee for such permit in the amount of \$500.00 to the Auditor or the Auditor's designee. In addition, the owner of a dangerous animal shall pay an annual renewal fee for such permit in the amount of \$500.00 to the Auditor or the Auditor's designee.

Should the owner of a dangerous animal fail to obtain a permit for such animal or to appeal the declaration of a dangerous animal, the County or the County's designee is authorized to seize and impound such animal and, after notification to the owner, hold the animal for a period of no more than five days before destruction of such animal.

A registration and permit will be issued to the owner of a dangerous animal upon payment of the permit and inspection fees if the owner is able to pass a site inspection within the prescribed timeframe by meeting the following inspection criteria:

- A. A proper enclosure of the animal with a posted warning sign as defined in Sections 6.02.010 Z. and DD.;
- B. Proof that either:
 - 1. The animal has been microchipped (and microchip number is provided), or
 - 2. The animal has an identifying tattoo, either inside the left ear or inside the left, rear, upper thigh of the animal and a color, digital photo of the tattoo (in electronic format) is provided for identification purposes;
- C. Two current, color, digital photographs (in electronic format) of the animal (minimum 3" x 5" in size), for identification purposes;
- D. Proof of current rabies vaccination;
- E. Proof the animal has been spayed or neutered.
- F. Proof of a policy of liability insurance (such as homeowner's insurance) issued by an insurer qualified under Title 48 RCW in the amount of at least \$500,000.00 (with Pierce County listed as the certificate holder), insuring the owner for any personal injuries inflicted by the dangerous animal, or proof of a surety bond issued by a surety insurer

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qualified under chapter 48.28 RCW in a form acceptable to the animal control authority in the sum of at least \$500,000.00 and payable to any person injured by the dangerous animal.

- G. Animal must be humanely muzzled, as defined in 6.02.010 V., when outside of its primary residence.
- H. Animal must wear a brightly colored collar (not less than two inches in width) with current license tag at all times.

Muzzle and collar must be available at time of inspection.

An owner who fails to pass inspection will be subject to a \$50.00 re-inspection fee per occurrence. Re-inspection must occur during the prescribed ten calendar day period; it does not extend the allotted timeframe.

(Ord. 2008-14 § 1 (part), 2008)

6.07.030 Confinement and Identification of Dangerous or Potentially Dangerous Animals.

- A. Following a declaration of a dangerous or potentially dangerous animal and the exhaustion of the appeal therefrom, it shall be unlawful for the person owning or harboring or having care of such dangerous or potentially dangerous animal to allow and/or permit such animal to:
 - 1. Remain outside of a proper enclosure while on the premises of such person; or
 - 2. Go beyond the premises of such person unless such animal is securely leashed and humanely muzzled or otherwise securely restrained.
- B. Dangerous or potentially dangerous animals must be tattooed or have a microchip implanted for identification. Identification information must be on record with the Pierce County Auditor.
- C. Dangerous or potentially dangerous animals must be currently licensed and the registration permit to own the animals as defined under Section 6.07.020 must be kept current at all times.

(Ord. 2011-43s § 1 (part), 2011; Ord. 2008-14 § 1 (part), 2008; Ord. 2005-108 § 1 (part), 2005; Ord. 97-111 § 5, 1997; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

6.07.035 Notification of Status of a Dangerous or Potentially Dangerous Animal.

- A. The owner of an animal that has been classified as a dangerous or potentially dangerous animal shall immediately notify the Auditor and Sheriff when such animal:
 - 1. Is loose or unconfined; or
 - 2. Has bitten or otherwise injured a human being or attacked another animal or livestock.
- B. At least 48 hours prior to a dangerous or potentially dangerous animal being sold, given away, or moved to another location, the owner shall provide the name, address, and telephone number of the new owner to the Auditor or the Auditor's designee. The new owner shall comply with all of the requirements of this Chapter in addition to any state and/or local laws in existence in the new location.
- C. When an animal classified as dangerous or potentially dangerous dies, the owner of said animal shall submit proof (vet records, etc.) to the Auditor or the Auditor's designee within ten calendar days.

(Ord. 2008-14 § 1 (part), 2008; Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990)

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6.07.040 Penalty for Failure to Control or Comply with Restrictions.

Any person who violates a provision of Chapter 6.07 shall, upon conviction thereof, be found guilty of a gross misdemeanor. In addition, any person found guilty of violating this Chapter shall pay all expenses, including shelter, food and veterinary expenses, including identification or boarding and veterinary expenses necessitated by the seizure of any animal for the protection of the public, and such other expenses as may be required for the destruction of any such animal. The animals are subject to seizure and impoundment consistent with Section 6.07.045.

Furthermore, any dangerous or potentially dangerous animal which attacks a human being or animal may be ordered destroyed when, in the court's judgment, such dangerous or potentially dangerous animal represents a continuing threat of serious harm to human beings or animals. (Ord. 2008-14 § 1 (part), 2008; Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

6.07.045 Impoundment of Dangerous or Potentially Dangerous Animals.

Should the owner of a dangerous or potentially dangerous animal violate the conditions or restrictions of owning and possessing a dangerous or potentially dangerous animal contained in Section 6.07.020 or 6.07.025 or imposed by the animal control authority, Hearing Examiner or district court, such animal may be seized and impounded.

- A. The owner may prevent the animal's destruction by, within two business days, petitioning the Hearing Examiner for the animal's immediate return.
 1. Except as provided in this Chapter, the petition shall proceed in accordance with the Pierce County Hearing Examiner Code, Chapter 1.22 PCC, as an appeal of an administrative official's decision.
 2. There is no fee for an appeal to the Examiner under this section.
 3. Notice of the hearing shall be mailed to the owner at the address listed on the notice of appeal.
 4. At the public hearing, the burden shall be on the County to prove, by a preponderance of evidence, that the owner failed to comply with the conditions or restrictions of owning and possessing a dangerous or potentially dangerous animal.
 5. The Hearing Examiner shall decide if the animal should be returned to the owner, subject to conditions that will bring the owner into compliance with this Chapter, or be humanely euthanized.
- B. If a decision to euthanize the animal is rendered by the Hearing Examiner, the owner may prevent the animal's destruction by, within seven calendar days:
 1. Petitioning the district court for the animal's immediate return, subject to court-imposed conditions; and
 2. Posting a bond or security in an amount sufficient to provide for the animal's care for a minimum of 30 calendar days from the seizure date.
 3. At the hearing in District Court, the burden shall be on the County to prove, by a preponderance of evidence, that the owner failed to comply with the conditions or restrictions of owning a dangerous or potentially dangerous animal.
 4. The scope of evidence and scope of review shall be de novo.
 5. The decision of the Examiner shall be upheld, reversed, or modified by District Court.

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If the animal control authority has custody of the animal when the bond or security expires, the animal shall be immediately forfeited to the animal control authority unless the court orders an alternative disposition. If a court order prevents the animal control authority from assuming ownership and it continues to care for the animal, the owner shall renew the bond or security, in advance, for all continuing costs for the animal's care.

(Ord. 2011-43s § 1 (part), 2011; Ord. 2008-14 § 1 (part), 2008)

APPENDIX C

Court's Instruction to the Jury No. 5

Court's Instruction to the Jury No. 11

INSTRUCTION NO. 5

The plaintiff Sue Gorman claims that the defendant Pierce County was negligent in one or more of the following respects:

- (1) failing to classify and control a potentially dangerous dog;
- (2) failing to protect the public from a potentially dangerous dog;
- (3) failing to confiscate and confine a potentially dangerous dog.

The plaintiff claims that defendant Pierce County's conduct was a proximate cause of injuries and damages to plaintiff. The Defendant Pierce County denies these claims.

The plaintiff claims the defendants Shellie Wilson/ Zachary Martin and Jacqueline Evans-Hubbard were both owners of dogs that attacked and bit the plaintiff Sue Gorman while she was in a private place, so they are strictly liable for any damages suffered by Sue Gorman. Defendants Wilson/Martin and Evans-Hubbard admit these claims.

All defendants further deny the nature and extent of the claimed injuries and damages.

In addition, the defendants claim as an affirmative defense that the plaintiff was contributorily negligent in one or more of the following respects:

- (1) leaving her door open so the dogs could enter, knowing of their potential for harm; and
- (2) in attempting to rescue the Jack Russell terrier instead of fleeing for her own safety.

The defendants claim that plaintiff's conduct was a proximate cause of plaintiff's own injuries and damage. The plaintiff denies these claims.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed; and you are to consider only those matters that are admitted or are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

INSTRUCTION NO. 11

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant Pierce County acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, the defendant was negligent;

Second, that defendants Wilson/Martin and Evans-Hubbard were each the owners of dogs that bit a person while in a private place and therefore are at fault and therefore strictly liable for damages suffered by the person;

Third, that the plaintiff was injured;

Fourth, that the negligence of Pierce County and/or the fault of the other defendants was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved against one or more of the defendants, your verdict should be for the plaintiff and against the defendant or those defendants. On the other hand, if any of these propositions has not been proved against one or more of the defendants, your verdict should be for that defendant or those defendants.

The defendants have the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent;

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligence.